SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

FLINT, EDDY & COMPANY,
Appellant,

AGAINST

GEORGE CHRISTALL and another,
Appellees.

No. 591.

On certificate from the United States circuit court of appeals for the second circuit.

BRIEF FOR THE APPELLEES.

This certificate from the court below raises a question of general average arising from a negligent stranding of the steamship *Irrawaddy*. The shipowner had furnished a seaworthy ship, which stranded by the master's fault on November 9th, 1895, since the Harter act came into operation. She was finally floated as a result of general average sacrifices made and incurred by the shipowners, through the acts of the master and the services of salvors.

After delivery of cargo on signing general average bonds, all the general average charges were adjusted and a portion paid by the cargo, leaving in dispute the assessment for the shipowners' sacrifices. On an admiralty suit being brought, the Honorable Addison Brown held that by the Harter act the shipowners were absolved from faults or errors of the master in navigation of the ship, and therefore entitled to recover contribution in general average for sacrifices growing out of a stranding due to such fault of the master. (82 Fed. Reporter, 472.)

The respondent appealed to the circuit court of appeals. That court thereupon asks :

"If a vessel seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the shipowner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and sup-

plied, under the provisions of section 3 of the act of February 13th, 1893, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding in successful efforts to save vessel, freight and cargo?"

By order of this court made March 14, 1898, this cause was advanced as under the thirty-second rule, to be submitted on printed briefs on or before April 11th.

The argument in favor of an affirmative answer to the question is:

The Harter act has freed the shipowner from responsibility for faults in navigation.

In case of a seaworthy vessel this exoneration is complete.

Where previously the shipowner could not have general average contribution, if his servants' faults had induced the peril, this exclusion was because these faults were then imputed to the shipowner.

Obviously a shipowner, bound to make good all consequences of a loss, could not call on the owners of the cargo to bear any part of his own ultimate burden.

Abolishing the shipowner's liability for faults in navigation applies to all relations between ship and cargo, and not merely to suits *against* vessel or owners.

This change of relation brings to the former conditions of general average the maxim—cessante ratione cessat lex.

A negligence clause releasing the shipowner' liability for faults in navigation in Europe allows the owner to recover general average, although the peril may be induced by fault of his servants, because of this discharge by contract from that liability, otherwise imputed to the shipowner.

A multo fortiori if the previous liability of the shipowner be abolished by Congress, quia potentior lex quam pactum.

The Harter act, in this respect, gives shipowners the advantages and immunities which foreign courts allow to be secured by contract—and this was the declared intent of Congress.

The learned counsel for appellant questions these propositions. The underlying grounds and conditions of general average are challenged, and the theory of such contribution is to be investigated. It seems also to be maintained that this

statutory change in the relations between vessel and cargo—this relief of the vessel from faults in navigation—has left the law of general average quite unaffected.

The consequences that flow from the liability of the shipowner to the cargo for faults of his servants are clear; and the new results from removing that liability are, I submit, equally clear.

It is now asked why the shipowner was debarred from contribution when fault brought on the peril—an inquiry carrying us to the sources of this branch of the law. The attention of this court is invited first to the historical side of the controversy, then to the state of contemporary European jurisprudence in 1893, the purpose of congress, the construction of the statute, and some consequences suggested, should the appellants' view prevail.

I.—General average arising from the faults of the master and crew under the Roman law and mediæval commentators.

The compilers of the Digest of Justinian placed the subject of general average in close relation to the law of liability of the shipowner for the acts of his servants. The title, De lege Rhodia de jactu, follows next after the rubric, De exercitoria actione. Under this first head—the action against shipowners for the acts of the master which are imputed to the principal—there is no trace of limit upon the full liability of the owner. The edict of Ulpian allowed a sure remedy for such faults in navigation as gave ground for the actio in exercitorem. It made no difference whether the shipmaster were bond or free, a minor or of legal age, because the tortious acts of the master were to be *imputed* to the owner who had appointed him—sibi imputaturo qui præposuit.

Dig. L., 14, 1, 1, § 4.

Having thus established a rule of absolute liability for such imputed fault, the next title, dealing with general average, treated of perils and sacrifices, based on the assumption that faults of the ship's servants carried with them a right of full

recompense from the principal. The Roman lawyers put *restitution* before *contribution*.

The possibility that the personal remedy against the owner might be ineffective through his insolvency, and a consequent failure to make good the damage caused by his servants, apparently was not considered.

The Digest contains no direct provision excluding from general average any consequence of neglect of a master or fault of the crew, since the actio in exercitorem was deemed a complete remedy for such a case.

Such has been the understanding of commentators. Vinnius in 1647 published a learned and authoritative edition of Peckius' treatise, Ad rem nauticam. He there discussed such neglects of the master and owners as were then common. These were overloading, wrongful stowage on deck, insufficient equipment, and failure to take a qualified pilot in entering a difficult port.

All these faults, he says, are ascribed to the master and owners, and therefore they do not form the basis of any general contribution, as the master is bound to make good all such damage.

"Culpæ magistri adscribitur, si navem plus æquo oneraverit, aut perperam positis mercibus in foris aut acatio *op den overloop off inde boot* & ideo si ob hanc causam factum fieri necesse fuerit, aut armamenta cædi, id detrimentum non sarcitur communi contributione mercium, sed ad solum magistrum exercitorem & navem pertinet. * * * *

In culpa quoque magister est, si ubi necessitas id exigit, aut fert consuetudo, non adhibuit peritum loci nautam *een lootsman off pilote*, cujus ductu evitatis brevibus aut saxis latentibus navis in portum agatur. Quod si neglexerit singulis vicibus multatur quinquaginta aureis realiis ; et præterea si quid damni ob hanc causam mercatores senserint, id omne sarcire tenetur."

Peckii Ad rem nauticam commentarii, quibus nunc accedunt notæ Arnoldi Vinnii (ed. Laurentius, Amsterdam, 1668), p. 236.

Loccennius, who wrote in Sweden, in 1651, a treatise, De jure maritimo et navali, also stated a similar reason for excluding such claims from general contribution.

"Si jactum fieri necesse sit, quod magister navem plus æquo oneravit aut perperam collocavit merces in foris, hoc detrimentum non sarcietur communi contributione, sed ad exercitorem et magistrum navis pro rata pertinebit. arg. l. 27, §§

25 D. ad leg. Aquil. l. 30 §2 D. locat. Grot. introd. jur. H. 3, 20, Vinn. ad Peck, 226. solius vero exercitoris damnum erit si ejus voluntate et periculo merces foris imposuerit magister navis." Liber II, Cap. VIII, § XIV ed. Heineccius p. 1005 (1740).

The citation from Grotius is from his Introduction to the Laws of Holland, written in the year 1620, during his imprisonment in the Castle of Louvestein, but not published until after his escape. It is thus given by his English translator:

"If the throwing overboard, stranding, cutting away, or other damage occurs in consequence of the master having overloaded the vessel, or improperly loaded it, as on the deck, or in the boat, or otherwise; *it would come entirely to the charge of the master and his owners, and the ship*, and is not brought into the average against the merchandize."

Introduction to Dutch Jurisprudence, trans. by Herbert, Book III, Chap. XXIX, Sect. 14, p. 417, London, 1845.

In 1698, John Voet also stated this liability for bad stowage where a jettison is afterwards made:

"Sed si ob id, quod plus justo navis onerata fuit, vel merces male collocatae in transtro forte au scapâ, vel alteri navigio deteriori ignorante mercium domino impositae, jacturâ vel aliter, obortâ tempestate perierint aut corruptae fuerint, de damnis hisce magister tenebitur."

Commentarius ad pandectas, vol. I., p. 694, (1726).

This question of fault by carriers of cargo was early defined by the Italian commercial lawyers. Straccha, in 1553, made a long enumeration of the faults of mariners. At that time, exactly as now, a deviation from the proper route made the carrier liable for subsequent casualties, even if pirates plundered the cargo. After such a deviation, the mariner was answerable for a jettison in a storm, which otherwise would have been a ground of general average contribution.

"Culpa etiam nautae adscribitur qui recta navigatione contempta littora devia sectatur; si enim ex eo quod solito itinere

non est usus merces perierint, vel quia forsan à piratis deprædatae, vel tempestatae jactus factus est, nauta tenetur."

Straccha De Nautis, pars 3 § 6, in Tractatus de mercatura seu mercatore (Venice, 1553).

This responsibility for fault was not limited to acts of the carrier. Anyone whose conduct brought a culpable damage to the adventure was liable. In times when piracy and capture were the chief sea perils, and merchant vessels depended on their speed for safety, it was held a grave fault to hinder a ship. This is traced especially through the fragments of the Greek laws.

Art. 56 of the Synopsis Minor of the Basilicas provides:

"If any one shall impede the ship and shall cause those in the ship to suffer damage either by pirates, that is, incur arrestments, commonly called captures, or by fire or other peril, he shall restore the damage who made the impediment."

1 Pardessus, 204.

In the compilation known as the Laws of the Rhodians, the authenticity of which is doubted, this provision appears amplified so that it expressly mentions the case of either merchant or part owner who impedes the ships.

Ius et leges Rhodiorum, § 28; in Vinnius appendix, p. 29.

The responsibility for faults was mutual. Cargo as well as ship was answerable.

"Si nauclerus una cum nautis negligens fuerit et damnum vel naufragium acciderit, idem nauclerus ac nautae mercatori ad praestationem damni tenentur. Si culpa *mercatoris* perire navim cum onere contingerit, *mercator* et naufragii et navis damnum agnoscat."

Kurike, Jus maritimum Hanseaticum, p. 788 (ed. Heineccius, 1740.)

Marquardus, of Lübec, in a treatise on mercantile law, published in 1662, declared this principle of full restitution for goods jettisoned through consequences of the faults of the master and crew.

"Planè si in culpa extiterit nauta, nec solertem satis oporam navaverit, nisi fatalis illa vis obstiterit; cum nihil adeò fortui-

torum capax quam mare; nec quisquam proinde adeò iniquus ut sceleri adsignet, quod venti ac fluctus deliquerint. *Tacit. 14 annal. in pr.* in restitutionem integræ jacturae et deteriorationis mercium condemnabitur." Tractatus politico-juridicus de jure mercatoria (ed. Francofurti 1662), p. 393.

Thus Weytsen in his Tractatus de averiis, which appeared in Amsterdam in 1672 stated that the consequences of negligence did not come into contribution.

"Similiter in collationem non venit, *quod per incuriam*, aut caeteroqui tempestate oborta è navi delabitur." §7.

Van Leewen observes in his note to this:

"Quod, si culpa, aut negligentia magistri sociorumve navalium fiat, mercatori magister resarcire debebit."

In Casaregis Opera, Vol. III., p. 10, ed. Venice, 1790.

Casaregis, a judge in Genoa, who made a special study of general average, about 1720 thus stated the principle of disallowing contribution for the results of negligence:

Etenim quemadmodum certissima juris regula est, quod si aliquod malum, aut adversum navi, et mercibus acciderit ob ignorantium, negligentiam, aut aliam culpam magistri navis, *non modo Avariam ille petere nequeat*, sed etiam obligetur ad reficienda damna ob hanc causam allata dominis navis et mercium.

De Commercio, Discursus, CXXII, Vol. 2, p. 4 (ed. Venice, 1790).

The *reason* why the owner and the master could not recover general average contribution was not left in doubt. It was explicitly stated.

Having examined the facts in a particular case and decided that the master could not have contribution (nedum contributionem exigere non poterit a mercatoribus), Casaregis gave the reason as follows:

"Ratio inter alias est, quia cum ipse mercedem pro mercibus vehendis recipiat, jure merito tenetur ad omne damnum, quod ex sui negligentia vel culpa mercibus eveniret."

Disc. XIX., Vol. 1, p. 53.

Bynkershoek (1673–1743) expounded with his usual clearness and accuracy the logical reasoning which excludes a jettison by fault of the mariner. First, he puts the question, and then quotes the Plaacæt, or Ordinance of Philip II. of 1563,* that if the ship had been wrongly loaded, the jettison would be to the cost of the mariner, "and is not brought into any average." "Which," says Bynkershoek, "I should understand thus, that this would take place (*i. e.*, refusal of contribution) only when the owner of the things jettisoned can recover the jettison from the mariner. Otherwise, if I judge aright, it is to be contributed for by all. *This rests on the principle that the mariner is answerable only for his fault* (Ut solus nauta culpam præstet, rationem habet); if, however, he be less competent, still the doctrine of jettison requires contribution, because it is made for the common safety."

"Rursus quæritur, an contributioni locus sit, si quid jactum vel dejectum sit, quod culpa nautæ male onerata esset navis? & ajunt § 8. Tit. IV. LL. Philippi II. & § 8. L.I.T. XXIV LL. Fris. solius nautæ damno id futurum, *en niet gebragt werden in eenige avarye.* Quod ita intelligerem, ut tunc demum locum haberet, ubi jacturum rerum dominus a nauta jacturam consequi posset, alioquin, si recte arbitror, ab omnibus contribuendum est. Ut solus nauta culpam suam præstet, rationem habet, sed si minus sit idoneus, quia pro salute communi jactum est, jactus ratio contributionem desiderat." Quæstiones juris privati, Book IV. cap 25, p. 729 (ed. 1744).

This doctrine that a contribution in general average was required to do full justice, was also stated by Wedderkop, a Danish author, who wrote in 1757. His Introductio in jus nauticam, a treatise of received authority, dealt with general average, and neglects of the master, as follows:

"In case the master has overloaded his ship without the privity of his shippers and has been compelled to jettison cargo, the owners may make reclamation against the master and shipowner; but if they are not indemnified they will have an action for contribution against those whose effects have been thereby saved, reserving to them a recourse against the master (jactarum dominis a reliquis bonis quæ jactui istiusmodi suam debent conservationem, fiat contributio, salvo priori casu contra nauclerum regressu)."

Wedderkop, Introductio in jus nauticam, p. 162.

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*In 4 Pardessus, pp. 64, 82.

It appears that a like interpretation was given to a Hamburg statute which excluded cases of overloading from general average. In practice it became usual to allow a remedy against the master, but not to deprive the cargo of contribution (sondern die Contribution in Havariegrosse doch gestattet, und nur ein Regress gegen den Schiffer gegeben).

Kaltenborn, Grundsätze des Europäischen Seerechts, vol 2, p. 76, note (Berlin, 1851).

Accordingly in 1851, Kalkenborn thus stated the general rule, that the first requisite of general average was a common danger—and that it made no difference if this danger arose from a personal fault.

Dabei ist es gewiss, obgleich namentlich die älteren Seerechte zum Theil anderer Meinung sind, für gleichgültig zu halten, ob die Gefahr durch die Schuld jemandes herbeigeführt sei oder nicht. Die Havariegrosse und die Contribution des Schadens nach deren eigenthümlichen Grundsätzen wird in dem einen, wie in dem andern Falle stattfinden dürfen. Dagegen versteht es sich von selbst, dass der durch seine Schuld die Gefahr Herbeiführende zur Verantwortung und zur vollen Entschädigung herangezogen werden dürfe.
Kaltenborn, vol 2, p. 76.

Hence it is certain—though some of the older maritime laws held a different view—that it is regarded as immaterial whether or not the danger was induced by some one's fault.

General average and contribution for the damage, according to their peculiar principles, will take place in the one case as in the other.

However, it goes without saying, that he, through whose fault the peril has been brought about, should be held to liability and to make full restitution.

This brief review is sufficient to trace the origin and reason of the rule excluding contribution, where the peril arose from negligence. The view first followed was strictly practical. With a liability of the shipowner to answer *in toto* for the fault of his servants, why could *he* distribute and lay on others any part of his own ultimate burdens? This exclusion of any contribution was absolute, so long as the ship owner's responsibility for his servants' faults remained absolute.

After the shipowner had succeeded in having his liability limited to the value of his ship, the courts soon saw a possibility of a failure of complete remedy. The next step was to allow general average to innocent cargo in cases of perils arising from negligence, leaving an ultimate resort to the owner, or to the culpable *rem*.

II.—The treatment in modern commercial codes of general average arising from faults.

Since 1860, the question has been so often discussed that codification after that time has provided expressly for such adjustments, reserving an ultimate remedy against the wrongdoer, or the principal who may be answerable for the fault.

The Norwegian Sea Law of 1860 provided by § 72:

"Even if the captain or crew have committed a fault for which they are responsible, the owner of the ship is not on that account deprived of his right to have general average. In this as in other cases the indemnity or damages that may be recovered from the captain or seamen is to be deducted from the sum apportioned as general average; if there is a difficulty in recovering it, the adjustment of the average is not to be delayed, but the amount recovered subsequently is to be refunded to those who have overpaid."

The German commercial code has dealt clearly with this point:

"Art. 704. The application of the rules for general average is not excluded by the fact that the danger has been occasioned by the fault of a third party, or even one of the parties interested in the adventure (dass die Gefahr in Folge des Verschuldens eines Dritten, oder auch eines Betheiligsten herbeigeführt ist). The party interested who is *in fault*, however, cannot demand compensation on account of any damage which is thereby sustained, but even is answerable to each contributor for the loss which he suffered through such damage being apportioned in general average. Should the danger have arisen through the fault of one of the crew, the owner is likewise answerable for the consequences, subject to the conditions of Articles 451 and 452."

The commission for this codification in their deliberations

said of the doctrine that excluded general average where the *ship* was primarily at fault:

"This view seems principally intended for the case when the operation of the average only concerns the shipowner. However, it would be highly unjust when the results of the average affect also the cargo interests; for example, after entering a port of distress, a part of the cargo is sold to pay repairs and expenses—if in such case one of the cargo interests whose goods had been sold were to have no claim for indemnity on his co-shippers if his lien on the vessel should be afterwards lost by its destruction before arrival at destination."

It appears that the above article was unanimously adopted.

Protokolle, Vol. VI., p. 2688, 2689.

Ulrich, in his treatise on general average, says:

"The German code allows neither the existence, nor the operation, of general average to cease when the danger is culpable—it matters not whether produced by the acts of an outside third party or through one of the participants."

Ulrich, Grosse Haverei, p. 11 (Berlin, 1884).

A later writer also says:

"It is immaterial to what circumstance the source of the peril is to be ascribed. It may arise from natural occurrences *or by human fault* (durch menschliches Verschulden.)"

Schroeder, Die grosse Haverei, pp. 44, 45 (Berlin, 1894).

The Swedish law of February, 1864, Art. 144, provided:

"It is a general average although the peril by which it has been occasioned arises from the master, the shipowner, or one of the cargo owners, or if the master's act from which the average resulted was without sufficient ground; but a right of action for indemnity is allowed against the one who caused the damage, and he is deprived of any action for contribution which he would have been entitled to."

Art. 135 of the maritime code of Finland, promulgated in 1874, provides:

"It is general average, although the danger which occasioned it has been caused by the fault of the master, the shipowner or cargo-owner or the master has taken the steps

which resulted in the damage without sufficient ground, but the one at fault loses not only his rights of indemnity, but further, is responsible to the parties in interest for the damage and losses."

In 1872 a commission was appointed by the Danish Government for the preparation of a new maritime code. In 1882 their first report was issued. In 1890, delegates from the three Scandinavian countries were chosen for a conference, with a view to obtain uniformity. In 1892, twenty years since this first beginning, their code was adopted by Denmark and immediately ratified by Sweden in 1892, and took effect in Norway on 1st of January, 1894.

Art. 191 of this code states:

"The circumstance that the sacrifice was rendered necessary in consequence of an error of judgment or neglect of either master or crew, or any other person on board, does not prevent the damages sustained from being brought into account as general average items; but the person who caused the damage cannot claim compensation for any loss he may have sustained himself owing to the average accident. If the danger, to which the vessel was exposed, was attributed either to the master, *or anyone else, for whom the owner is responsible*, the latter has no claim for compenation for the loss he sustains."

The French code of commerce, enacted in 1808, followed the Ordonnance of 1861 and by Art. 405 provided:

"The damages happening to the cargo by fault of the master, not having closed firmly the hatches, moored the vessel, supplied good tackle, and by all other accidents proceeding from the negligence of the master or company, are also particular averages, to be borne by the cargo owner, but for which he has his recourse against the master, ship and freight."

The precise effect of this article has been much discussed. The text writers are divided whether this covers voluntary sacrifices.

In 1891 the steamship *Wildcroft*, having an insufficient supply of fuel, burned her fittings, and finally reached port after burning some 2,000 bags of her cargo. The consignees of the burned cargo claimed a general average in their behalf, and the master disputed any fault on part of the vessel. The

tribunal of commerce of Marseilles decided that the master and owners were both to blame for the running short of coals. On the point of the consignee's right to a general contribution the judgment said, after declaring the ship's primary fault :

"Que cette faute, ne pouvant être reprochée aux consignataires, retomberait cependant sur eux, s'il leur était également interdit quand leur marchandise a été sacrifiée et brûlée dans l'intérêt commun, de se faire indemniser dans un règlement d'avaries communes ;

"Que le refus de ce droit aboutirait à une véritable iniquité, en laissant le consignataire en face d'un capitaine fautif et d'un armateur responsable, insolvables peut-être, ou difficiles à poursuivre et à atteindre ; en laissant sans aucun risque de ce genre les consignataires qui ont profité du sacrifice et reçu à cause même de ce sacrifice l'intégralité de leurs marchandises."

"That this fault, not to be laid to the consignees, would still fall upon them should they also be equally prohibited, when their goods had been sacrified and burned in the common interest, from indemnifying themselves by an adjustment of general average;

"That the denial of this right would produce a real injustice in leaving the consignee in face of a master, negligent, and an owner, liable, but possibly insolvent, or difficult to follow and reach, and leaving without such risk those consignees who had gained by the sacrifice, and through the same sacrifice had received their own consignment entire."

Upon an appeal to the court of appeal at Aix, that Court said, in August, 1892, after holding the master and owner at fault :

" Considérant que notre législation, nullement différente, en la matière, de celle de la plupart des autres nations civilisées n'en fournit heureusement pas d'autre que celle qu'ils ont très équitablement adoptée, et que le paragraphe final de l'article 400 du code de commerce trouve ici sa juste et naturelle application ;

Considérant, en effet, que,

Considering that in this respect our law, no different from that of most civilized nations, fortunately has not provided anything divergent from what they have most equitably adopted, and that the last paragraph of article 400 of the code of commerce finds here its just and natural application ;

Considering that the act

dans l'évênement qui occasionne le procès se rencontrent au plus haut degré tous les caractères essentiels de l'avarie commune à savoir: le sacrifice voluntaire motivé par un péril imminent, accompli en vue du salut commun et ayant produit le résultat souhaité;

Qu'il n'importe, comme l'a expressément jugé la chambre civile de la Cour de cassation, par son arrêt de rejet du 2 avril, 1878, que la cause première qui a ultérieurement rendu nécessaire la dépense faite simultanément pour le bien du navire et de la marchandise doive être attribuée non à une fortune de mer mais à une faute commise par le capitaine;

Que sans doute cette faute rendrait celui ci irrecevable à demander le règlement d'une avarie commune que son impéritie a nécessitée, et produirait le même effet à l'égard de son armateur à moins qu'il ne se fût affranchi de la responsabilité lui incombant du chef de son préposé mais qu'elle ne saurait mettre obstacle au droit des chargeurs, seules victimes du dommage ainsi souffert de réclamer eux-mêmes ce règlement.

Dalloz, 1894, 2, 565.

which occasioned the proceeding has in a high degree the essential characteristics of general average, namely the voluntary sacrifice caused by imminent peril, performed with a view to the common safety and having produced the desired result;

That, as was expressly held by the civil chamber of the Court of cassation by decision of dismissal of April 2, 1878, it is immaterial that the primary cause which ultimately rendered necessary the outlay that was made alike for the good of ship and cargo should be ascribed, not to accidents of the sea, but to the master's fault;

That without doubt this fault prevents him from demanding an adjustment of general average which his unskillfulness has caused, and produces the same effect on the owner, *unless he has relieved himself from liability on account of acts of his agent*, but this would form no obstacle to the right of the shippers—the only victims of the damage sustained—to themselves demand an adjustment.

An appeal was taken on behalf of the steamship to the court of cassation, which affirmed the above decision, without, however, expressly discussing this right of general average among the cargo interests. Dalloz, 93, 1, 408.

Although the Italian code follows the French in excluding from general average damage arising from accidents which

proceed from neglect of the master and crew (Codice di commercio, art. 646, sub. 7), it is also recognized by authorities that a sacrifice made for the general safety does not lose its general average character, because the emergency requiring the sacrifice may arise from the fault of one of the parties.

" Ma la colpa di uno fra gli interessati o di un terzo può mettere la nave e il carico in condizione tale che si debba ricorrere a un sacrificio per il bene e la salvezza di entrambi. E a questo riguardo noi vedemmo a suo tempo come l'avaria non perda il carattere di commune per questo che il pericolo, che si evitò col sacrificio, sia stato suscitato da colpa di qualcuno degli interessati o di un terzo. Ma osservammo pure pur che se la cosa sacrificata appartine a colui che è in colpa, questi non può spiegare un'azione verso gli altri, per ottenere il rimedio della contribuzione, per il motivo che tutte le quote di questa dovrebbero in definitiva andare a esclusivo di lui carico."

"But the fault of one of those interested or of a third party may place the vessel and the cargo in such a condition that it is necessary to resort to a sacrifice for the good and safety of both. And in regard to this we have seen how the average does not lose the character of general, because of the fact that the danger which is avoided by the sacrifice, has been caused by the fault of some of those interested, or of a third party. But we observed also that if the thing sacrificed belongs to the person who is in fault he cannot maintain an action against the others to obtain the remedy of contribution *for the reason that all the parts of this contribution must finally be borne exclusively by him.*"

Belingieri, Della Avarie e della Contribuzione, Torino, 1883, p. 190.

The solution of this question by the Antwerp Congress of 1885, was:

" 22 Les règles relative á l'avarie commune doivent s'appliquer même lorsque le danger cause primordiale du sacrifice ou de la dépense été amené soit par la faute du capitaine de equipage, ou d'une personne intéressée au chargement, soit par le vice propre du navire, ou de la

The rules respecting general average should have the same application when the danger which is the original cause of the sacrifice or the outlay has been induced either by the fault of the master or the crew or of a person interested in the cargo, or by the inherent vice of ship or cargo.

marchandise. Le recours que donne faute ou le vice propre doit être independant du rég lement de l'avarie commune."

The remedy which is given by the fault or defect should be independent of the adjustment of general average.

5 Valroger, Droit Maritime, 405.

The circuit court of appeals for the second circuit held before the Harter act, that cargo could recover general average in case of sacrifices caused by a negligent stranding.

Judge Shipman said:

"The law of the sea, which first established the doctrine of general average, placed itself upon the equitable principle that those who put the property which they separately owned to the hazards of a common peril should bear proportionally the losses which an innocent owner had endured by the sacrifices of his property in successfully saving the other owners from the common dangers; and *therefore* it did not allow the owner of the vessel or cargo, who was in fault, and who produced the calamity, by himself or by his agent, to share in the contributions from the other sufferers. * * *

But the fact that the vessel was in fault presents no equitable reason for preventing the cargo owner from his right of contribution from the owners of the saved cargo, and gives them no just reason for refusing to contribute. When the calamity which was initiated by the fault of the master is imminent, it is his duty to take measures to overcome his mistake, and, if necessary, he has the power of sacrificing a portion of the cargo to save the residue; but his previous fault does not impair the cargo owner's equitable right to receive compensation, if his sacrifice has saved the property of others."

Pacific Mail *v.* Mining Co., 74 F. R., 565, 567.

The learned district Judge has summarised the provisions of these codes, and the theory of general average, in a generalization that can hardly be abridged or modified, and I therefore venture to quote it in full:

"All the maritime codes that exclude the shipowner from reimbursement in general average for the ship's fault, make him liable to cargo owners for the master's bad navigation. This exclusion is based on his *liability to the cargo owner*, which logically and necessarily excludes the shipowner's claim to contributions in two ways: First, because the obligation to indemnify would require the shipowner at once to restore to the cargo owner as damages whatever he might collect from

him as general average; second, because the same obligation makes the shipowner's claim to contribution incompatible in its inception with the fundamental conditions of a general average claim, viz., that there must be, (1) a sacrifice, (2) a sacrifice voluntarily incurred, (3) a sacrifice incurred for the common benefit. But when the ship, through the master's fault, is legally responsible for all loss and damage, her expenses in rescuing the cargo from the peril which that fault has brought about cannot possibly be treated as a sacrifice, since such expenses are nothing more than the performance of a legal obligation; for the same reason they are not voluntarily incurred, in the legal sense, since the ship is legally bound to make the rescue and bear all the expense of it, or else pay the increased damages from omitting to do so; and so the expenses of rescuing the cargo are not ultimately for the cargo's benefit, but for the pecuniary benefit of the ship, in diminishing as much as possible the cargo damages, for which the ship's liability is already fixed by reason of her fault. Thus the ship's liability for all the loss and damage arising from her fault, *whenever this liability arises*, necessarily excludes any equitable claim by her owner to an average contribution from the cargo, because the legal conditions of such a claim cannot in such a case exist; and because, if allowed, any such contribution must be at once repaid to the cargo owner as damages." (Record, pp. 7, 8.)

III.—The effect of negligence clauses upon the owner's right to contribution in general average.

As the basis of refusing contribution was the owner's liability for the acts of his servants, when this responsibility had been contracted away, the owner became entitled to full contribution. Being no longer answerable for the faults in navigation which had before been imputed to him, he was left free to enforce contribution for general average sacrifices.

Such negligence clauses have only been in vogue about twenty years. Their effect, for general average purposes, is to put the exonerated faults in navigation on a level with sea perils.

One of the first cases was that of the French steamship *Amérique*, which was abandoned at sea in an alarm because of an open port—an act of gross negligence of her officers and crew. Salvors afterwards picked her up as a derelict and

brought her into Plymouth. The vessel and cargo were subjected to heavy salvage charges. (The *Amérique*, 2 Aspinall's Maritime Cases, N. S., 460.) Subsequently these were stated in general average, and a suit was brought in France by the shipowner to recover the cargo's proportion. The cargo interests naturally claimed in defense that all the sacrifices and losses arose from the neglect of the officers of the ship—which under the old form of contract would have been a valid defense. The company, however, had inserted in these bills of lading a clause of exemption for such faults of their servants.

The court of cassation held that the owner could therefore recover general average contribution, because the company "était licitement exonérée de la responsabilité des ses sortes de fautes par la convention."

Dalloz, 1878, 1, 479, 489.

This decision modified the previous jurisprudence of France, which up to 1870 had not recognized any right to distribute in general average any consequence of a loss occurring through negligence.

Valroger says of the present jurisprudence:

"Malgré la faute du capitaine, le propriétaire du navire peut exercer une action en contribution contre les chargeurs si, dans ses rapports avec les chargeurs, il s'est affiranchi de la faute du capitaine."

Droit Maritime, vol. 2, p. 30.

Nevertheless, Mr. Lowndes, in the last edition of his work on general average (1888) continued to print without modification a statement sent to him by M. de Courcey and M. Sorel, of the Comité des Assureurs Maritimes of Paris, a proposition which later decisions have made very misleading.

"Q. Can there be a general average when the danger has arisen from unseaworthiness, the fault of the captain, or *vice propre* of the cargo?

"A. No. The expenses of putting into a port of refuge in that case are chargeable against the party who has occasioned it; and that party is also liable to an action for damages on the part of those who have suffered loss through the fault or the *vice propre*."

Lowndes on Average, 4th Ed., 379.

The French decisions cited as supporting this text are between 1856 and 1863, and are obviously superseded by the adjudication above cited of the court of cassation in 1878.

On June 12, 1894, the court of cassation again had a negligence clause in the contract. The general average was for bearing away at sea for a port of refuge because of a fire on shipboard, which was due to the negligence and imprudence of the officers and crew. The court held that although, in the absence of such a clause, such expenses would be particular average to be borne only by the ship, they were here properly recoverable as general average. The action was by Crowley, master against Saint-Freres, owners of cargo.

Attendu d'autre part, qu'il n'importe que le changement de route, la relâche, et les frais qu'ils ont occasionnés doivent être attribués non à une fortune de mer, mais, d'après la cour de Douai, à un fait imputable à Crowley; que si, en effet, les dommages qui sont la conséquence d'une faute du capitaine ou de l'équipage sont, en principe, avaries particulières, l'armateur s'était dans l'espèce exonéré de la responsabilité de ces sortes de fautes par une clause de la charte-partie, dont l'arrêt attaqué a proclamé lui-même la validité et à laquelle il a donné effet;

Whereas on the other hand it is immaterial that the change of voyage, the putting into port and the expenses which were thereby occasioned should be attributed, not to a peril of the sea, but according to the court of Douai to an act imputable to Crowley [the master] as even if the damages resulting from a fault of the master or crew are in principle particular average, in the case at bar the shipowner had been exonerated from liability for faults of this kind by a clause of the charter party, of which the decree appealed from has declared the validity, and to which it has given effect.

Attendu dès lors que les dépenses causées par la relâche de l'*Alexander Lawrence* à l'île Maurice devaient être classées en avaries communes.

Whereas therefore the expenses caused by the *Alexander Lawrence* putting into the island of Mauritius should be considered as general average.

Dalloz, 1895, part 1, pp. 41–44.

Also reported Revue int. du droit maritime, vol. 10, p. 147.

On February 6, 1895, in case of Oriental Steamship Co., against Genestal, the court of cassation repeated almost the

words of the above decision, where a collision was shown to have been caused by the negligence of the master, from which the bill of lading absolved the owner. The charges claimed included putting into a port of distress, with the expenses for temporary repairs and other outlays incurred by the owner to restore the ship so that the voyage could be resumed. The court again held that the exoneration in the contract required such sacrifices and outlays to be contributed for as general average, reserving to the cargo a recourse against the master.

Dalloz, 1895, Part 1, pp. 399-400.

In the case of the *Carron Park*, 15 P. D., 203, 207, Lord Hannen said that the negligence of the crew, for which the shipowner is not responsible,

"is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner, and the expenditure or sacrifice made by him is not made to avert a loss from himself alone, but from the cargo owner."

See also Strang *v.* Scott, 14 Ap. Cas., 601.

In the Liverpool Conference of 1890, which revised the York-Antwerp rules of general average, it was proposed to embody this principle in the new set of rules. It was thus formulated:

"No claim for contribution in general average shall be allowed in case the danger which necessitated the sacrifice or expenditure arise from default of the party claiming contribution thereto, or of some person for whose default such party is responsible, *unless by the terms of the contract of affreightment the party claiming contribution* is relieved from liability *for the default.*" Proceedings of Conference, p. 212.

This resolution was not adopted, because it was considered undesirable to formulate general legal principles in these rules; and for the further reason that the *Montana* decision rendered the proposed qualification of the rule unavailing in the United States, as the law then stood.

A recent statement of the Scotch law, after repeating the rule that no general average can be claimed in case the peril arose from fault, continues:

"But where the other interests have agreed to run the risk

which has brought about the peril, a claim can be made, *e. g.*, where by the bill of lading the owners are freed from liability for the negligence of the master, and the sacrifice has been necessary because of a peril due to negligence on his part."

Green's Encyclopædia of the Law of Scotland, vol. I., p. 364 (Edinburgh, 1896).

Before the passage of the Harter act this precise point had not been decided in the United States. As the clause of exoneration was here held unlawful, such attempted exemptions by contract were deemed entirely ineffective.

In the *Ontario*, Mr. Justice Brown, then District Judge, had occasion to consider the question of negligent stranding in relation to the liability of an *underwriter*. The opinion, in passing, touches on the ordinary case of general average between vessel and cargo:

"If this were an action by the shipowner against the owner of the cargo for a general contribution, we apprehend that it would be a sufficient answer to show that the necessity for the sacrifice was occasioned by the negligence or unseaworthiness of the ship. We understand the law to be as stated in Gourl. Gen. Av. 15, that 'if the necessity for the general average act arises through the unseaworthiness of the vessel, the vice propre of the cargo, or the negligence or barratry of the master or crew, no contribution generally would be due. If the danger and the necessary sacrifice are produced by the fault of the vessel or captain, and the vessel appears as a claimant for contribution, it would seem a proper answer that he by whose neglect the loss had been produced should bear it without relief.' See, also, Lowndes Av. 138; Chamberlain *v.* Reed, 13 Me., 357; *The Ann Elizabeth*, 19 How., 162; Ross *v. The Active*, 2 Wash. C. C., 226; *The Jenny Jones*, Deady, 82; Bentley *v.* Bustard, 16 B. Mon., 643; *The Norway*, Brown & L., 377; Schloss *v.* Heriot, 14 C. B. (N. S.) 59. There can be no doubt in my mind, under the facts of this case, that if the owners of the cargo sacrificed had sued the vessel and her owners, they would have recovered not merely a general average contribution, but the entire value of the property."

37 Fed. Rep., 220, 222 (1889).

In the case of Ralli *v.* Troop (37 F. R., 898), the principle

was discussed in a case of fire alleged to have been negligently started. The district court said at p. 890:

"It is no doubt the ordinary rule in the law of general average, that, where the ship's negligence has made the sacrifice necessary, she cannot recover a general average contribution from the cargo. Many of the maritime codes expressly so provide, and the text books so state the rule. See the recent case of *The Ontario*, *ante*, 222. This proceeds, as I understand, upon the ground that the ship is herself responsible to the cargo for her own neglect. She therefore cannot take from the cargo under the name of 'general average' what she is at the same moment bound to make good and restore by reason of negligence. *If that is the foundation of the rule, it cannot apply to those causes of sacrifice for which the ship and owners are not legally liable*, and by the British statute, as well as the statutes of the United States, there is no liability for loss by fire 'without the owner's fault or privity.' Macl. Shipp. 9, 121; Rev. St. U. S., §4282. *To deny the owners the benefit of a general average contribution on the ground of negligence would impose upon them, in effect, a liability for the fire, from which the statute exempts them.*"

See the *Nicanor*, 44 F. R., 509.
The *Energia*, 61 F. R., 222, 224.

Both in England and in the United States it has been held that the exoneration of the owner for the liability for fire on shipboard by statute did not effect the contribution due *from him* for subsequent general average sacrifices to quench the fire.

Schmidt *v.* Steamship Co., 45 L. J. Q. B., 646.
Crooks *v.* Allan, 5 Q. B. D., 38.
The *Roanoke*, 46 F. R., 297; 53 do, 270; 59 do, 161.

In other words, the liability for causing the fire, and the duty to contribute to sacrifices to save the adventure from that fire, were distinct. The owner, being relieved from the cause of the fire, was on an equality with the cargo, as far as regards contribution for saving the common adventure. The *Roanoke* fire was on May 17, 1890, before the Harter act.

A recent decision in Belgium sustains the owner's right of general average contribution in case of collision by fault of

the master, where he was protected by the exemptions against negligence, which principle is declared to be now accepted

" d'une manière quasi-unanime les auteurs et la jurisprudence des cours et tribunaux étrangers."

The *Alacrity*, Revue internationale du droit maritime, vol. XI., p. 123.

The same line of reasoning has been followed in *salvage* decisions.

In cargo *ex Capella*, L. R., 1 A. & E., 356, Dr. Lushington pronounced against a claim of salvage by one colliding vessel against cargo on the other, both ships having been mutually at fault for the collision. In substance he held that the shipowner could not recover for his own wrong. This is decided also in the *Clarita* and the *Clara* 23, Wall., 1, 19. (1874.) But if the shipowner be not liable for the particular acts or accidents that imperil the cargo—these being excepted in the bill of lading—it is well settled that he can receive full salvage.

The *Miranda*, L. R., 3 A. & E., 561.
The *Laertes*, 12 P. D., 187.

The law of *limited liability*, though having a different effect on the right to general average, is not contrary to this principle. That statute does not take away all liability and absolve the vessel owner, but only reduces the sum recoverable in damages.

It does not change the legal relations, but only abridges the *remedy*.

Hence, although the shipowner pay the statutory sum into court, he is not completely absolved, so as to cancel all pre-existing liability, but if his vessel be raised, his fault disentitles him to recover any contribution therefor in general average, where there is no negligence clause in the contract.

The *Ettrick*, L. R., 6 P. D., 127.

All courts* therefore recognize that the only bar to re-

*Those of Holland, being limited by the express prohibitions of the code, are an exception. See the *Mary Thomas* [1894] P. 104. Even there an exception has since been adopted in bills of lading that expressly waived the article of the code—which contract is now understood to be valid and effective.

covery of general average is a counter-liability to answer for the original cause of the damage. If, however, the relations have been varied so that the master's acts are not imputed to the owner, then this ultimate liability being withdrawn, the cargo has no ground to decline to contribute to all sacrifices made in its behalf.

IV.—THE OBJECT OF THE HARTER ACT WAS TO BRING TO SHIPOWNERS IN THIS COUNTRY THE SAME RELIEF WHICH SHIPOWNERS IN EUROPE ALREADY ENJOYED THROUGH LIBERTY OF CONTRACT AGAINST NEGLIGENCE. IT WAS FURTHER DESIGNED TO MAKE THIS EXEMPTION CERTAIN, UNIFORM AND UNVARYING BY A STATUTE ESTABLISHING CLEARLY THE LINE OF LIABILITY AND EXEMPTION FOR THE ACTS OF THE SHIP'S SERVANTS.

After the bill had been amended in the Senate, in its present form, Mr. Lind, of the House Committee, in charge of the measure, said:

"As the law now stands, American vessels are subjected to certain hardships from which they cannot exempt themselves by contract or otherwise, to which foreign vessels are not subjected. A foreign vessel, of course, can contract with a shipper and make provision against any liability of its masters or owners; but the object of this bill is to limit this right. An American vessel cannot make any such contract or absolve itself from any such liability, for the reason that it is always amenable to the Federal courts, and the Federal courts have always held that contracts of that character are against public policy."

Congressional Record, 52nd Cong., Secd. Session, p. 1181.

In the *Delaware* (161 U. S., 459), Mr. Justice BROWN said:

"It is entirely clear, however, that the whole object of the act is to modify the relation previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provision, which are evidently designed *to fix the relation between* the cargo and the vessel and to prohibit contracts restricting the liability of the vessels and owners in certain particulars connected with

the construction, repair and outfit of the vessel, and the care and delivery of the cargo."

In an early case under the Harter act, it was said:

"In return for these beneficial provisions in favor of the cargo, the cargo seems designed to bear the losses from faulty navigation that would have previously been charged upon the ship." The *Viola*, 60 F. R., 296, 298.

V.—THE THIRD SECTION OF THE ACT MODIFIES THE RELATION BETWEEN THE SHIPOWNER AND HIS SERVANTS WHATEVER MAY BE THE FORM OF PROCEEDING. THE SHIPOWNER IS RELIEVED FROM FAULTS OF NAVIGATION. WHETHER HE IS LIBELLANT FOR A CONTRIBUTION, OR DEFENDANT IN A DAMAGE SUIT, HE STANDS CLEARED OF ALL FAULT OF HIS SERVANTS.

The language of the third section of the act is clear and comprehensive:

"Neither the vessel, nor her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The words "become or be held responsible" cover every possible form of liability. By this statute, the ship is exempted from every consequence of the faults or errors of the master or crew.

Thes relations are fixed so that henceforth the navigation and management are put outside the limits of the shipowner's responsibility. It is more than a "statutory bill of lading" (The *Chattahoochee*, 74 F. R., 904). It is an absolute determination of the claims that the cargo may make upon the ship even in the absence of contract between the parties. The former recompense in damages which the cargo owner could obtain from the carrying ship is taken away; and on proof that the owner had a seaworthy vessel, the former liability never comes into being.

It is unreasonable to contend that the shipowner, while freed from a suit for stranding of his ship and consequent damages

to cargo, is nevertheless chargeable with the acts of his servants, so that he cannot make sacrifices and recover in general average. Such an interpretation would mutilate the statute, and would be repugnant to plain principles of commercial law. The cross-liabilities that formerly existed between the ship-owner on the one side for the acts of his servants, and the cargo interest for the sacrifices in its behalf, no longer stand arrayed in opposition. The first liability is non-existent. It is not a case of a liability satisfied, limited or suspended by compliance with a remedial statute. It is effaced. Hence, in no form of proceeding can the owner directly or indirectly, be held responsible, for such damage or loss.

VI.—THE ARGUMENT OF STRICT CONSTRUCTION HAS NO PLACE WHERE THE WORDS ARE CLEAR AND UNAMBIGUOUS.

The duties of the shipowner are stated in very general terms in the first and second sections of the act. The tests of due diligence, what shall amount to proper equipment, the obligation to make the ship seaworthy, what may be faults or errors in navigation, or how far the management of the ship extends—these and the like, are all questions upon which the rule of strict construction may well be applied.

But once given a fault or error in navigation, no court can hold the owner or vessel responsible for resulting damage or loss without plain violation of the express terms of the statute. Unquestionably the purview of the statute must be limited in many ways by conservative maxims of construction. But a clear fault or error in navigation of a seaworthy ship remains outside of and beyond the responsibility of the ship-owner.

VII.—IF ANY DISTINCTION IS TO BE DRAWN BETWEEN CONVENTIONAL AND STATUTORY EXEMPTIONS, THEN THE LAW OF CONGRESS SHOULD HAVE AT LEAST AS BROAD A SCOPE AS A STIPULATION OF PRIVATE PARTIES.

In *The Delaware* Mr. Justice BROWN said:

"The Act was an outgrowth of attempts made in recent years to limit as far as possible, the liability of the vessel and

her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage and negligence in navigation and from forms of liability which had been held by the courts in England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequence of her own negligence."

161 U. S., 459, 472.

When Congress thus declares the rule of liability, the law is made certain for all transportation of cargo in vessels coming to or from this country. Whether before this statute private individuals could make such agreements, had long been mooted. Once the matter is settled by congressional action, the line is permanently established. Even if the act did, in substance, make a statutory bill of lading, as the court of appeals in the first circuit said, it is stronger in its effect and more conclusive upon the cargo than any instrument passed merely between private parties.

Clauses in a private contract attempt to release a liability, and operate as a waiver of existing rights. But this statute goes to the root of the rights themselves, and hence its effect is beyond that of any conventional discharge of liability.

The argument by Mr. Carter that the rule of strict construction, which is applicable to statutes, does not apply to the contracts of a common carrier, is palpably against the jurisprudence of this court. Such contracts by carriers against negligence have always been strictly construed even to the point of holding the negligence clauses wholly void (129 U. S., 441), and those exemptions more general in scope, which were suffered to stand at all, are regarded by this court as inserted by the shipowner for his own benefit, and "unquestionably to be construed most strongly against him."

Compania la Flecha *v.* Brauer, 168 U. S., 104, 118.

Indeed, the construction of *statutes* both here and in England, is far less strict than under those salutary canons by which the so called *contracts* of carriers are construed most strictly, when they attempt thereby to escape their common law liability.

In the cases of salvage, which have been before referred to, the owner has full right to recovery—even receives a merito-

torious reward—where he is not answerable for the cause of the damage, although the peril is a breakdown of his own ship. Salvage requires higher grounds of equitable merit than contribution in general average.

The idea that it is inequitable for the cargo to contribute to make good the owner's sacrifices really comes from a reluctance to accept the scope of the statute. The legal responsibility, though thus abolished, is so familiar and deep-seated that it is still effective in the mind of underwriters. Hence it is difficult for them to conceive of the mutual rights, where the ship-owner's imputed responsibility, so long held by the courts as lasting all through the voyage, is reduced by statute to those acts only that are directly under the owner's control.

VIII.—To limit the statute to suits by cargo (where the ship-owner is concededly protected) leaving the ship unprotected where general average is concerned, would be disastrous to commence.

To take this case of *The Irrawaddy*. During fog the steamer has stranded, presumably from the failure of the master properly to use the lead. Whatever damage the cargo *had* sustained at this point, or whatever burden it *may* incur to be rescued, cannot be recovered from the ship. In this state of things what is to be done? The whole law of general average is designed to facilitate prompt action in time of danger, so that the master or owner will be free to sacrifice any property for the good of all. If the view of the law contended for by the appellant were to prevail, at such a juncture, the master for the owners would decline to sacrifice their property to avert a loss for which they were in no respect accountable. The master communicating with his owner would be informed that for such sacrifice of the ship and appurtenances no contribution could be had from the cargo. Naturally he would not act.

This court in the case of Ralli *v.* Troop (157 U. S., 386), has decided that only the master can make a legal general average sacrifice binding all interests.

In substance then, the position of the appellants, if sus-

tained, would tend to destroy all general average at the time when the greatest peril existed. Its disastrous consequences to commerce would be incalculable.

The position in this case of the cargo is not logical. It admits a liability for all salvage which the shipowner has incurred and paid. But the cutting through the bulkheads of the vessel and flooding the engine room (libel, Art. 4; Record, p. 2) are just as much of an independent sacrifice at the cost of the owner, as the outlays which are made to wreckers. No distinction, such as is here attempted to be maintained, is practicable. Suppose a vessel is in distress and in peril of going ashore and the masts are cut away. Is this any less a sacrifice because the *pilot* may have allowed the ship to approach too near a lee shore? Whether the shipowner could recover for the mast would depend on the rule of local law whether he was answerable for the neglect of the pilot. If not, the sacrifice to the ship would be as clearly recoverable, as the money the shipowner might pay a salvor to have the ship afterwards extricated.

IX.—THERE IS NOTHING INEQUITABLE, BUT THE REVERSE, IN LIBELLANTS' RIGHT TO CONTRIBUTION FOR THE LATER SACRIFICES MADE IN ORDER TO FLOAT THE VESSEL.

It seems to be contended (and is the idea of some cargo underwriters), that such sacrifices are only proper and reasonable outlays for the shipowner to make from his own pocket. They consider that his property should be thus burdened because of the negligence of his servants in the stranding of the ship. But the shipowner, in making the sacrifices, acts as a trustee for all interests committed to his charge. It is equitable that he should have full contribution, unless some interest can offset some cross-liability or counter-equity. When Congress has declared that the owners is freed from any liability for these prior losses, it would be grossly inequitable to take his property to help repair them.

In the *Mary Thomas* [1894] P. 104, 117, Mr. Justice BARNES said :

"It seems to me quite obvious that when, by the terms of the contract of carriage, certain responsibilities are excepted—that is to say, in that particular case the negligence of the master or officers, which produced a stranding, that the owners, not being responsible for the consequences of this negligence—the position is this: that the shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk; and going back to the way in which this matter is discussed in some of the old books, if both of the parties were there at the time, each responsible for the difficulty in which they found themselves, that is to say, each of them bearing the loss which would result from it, they would naturally say, 'We must spend some money to get out of this difficulty, and that we must share in the proportion to the benefit to be derived from it.' And that seems the basis of the reasoning in this case, and therefore indirectly the contract of carriage does vary the position of the parties with regard reference to the general average, because it varies the risks which the general interests are exposed to.

The contention of the senior counsel for the appellant is that the decision of the court below offends against a *principle.* Not one of abstract right, for he admits that by that standard no one, including a shipowner, is answerable for another's fault. Not a matter of logic, because to deny the shipowner contribution in general average is to make him responsible for that from which Congress has absolved him. This elusive *principle* invoked then is but a rule of artificial law, so long received in human society that men can hardly change it.* Congress may extinguish the liability on which it rests, but the rule itself has a mystical and sacrosanct character that virtually makes it perpetual.

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* Although the incidents of the law of general average have come down from a far antiquity, even that elder branch of the maritime law cannot claim the quotation in Mr. Carter's brief, "nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac." This was not said of any law of man. Only those abstract principles of eternal justice—that supreme law above us all—were meant, as the continued text shows:

"Sed et omnes gentes et omni tempore, una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus; ille legis hujus inventor, disceptator, lator, cui qui non parebit, ipse se fugiet, ac, naturam hominis aspernatus, hoc ipso luet maximas poenas, etiam si cetera supplicia quæ putantur effugerit." De republica, lib. III, Cap. XXII.

This would give to rules of law a fixity and defect of logic, which happily they cannot possess. It may be a natural belief of the lawyer that his sets of rules endure—a superstition from which perhaps none are wholly free. In the sixteenth century, this view of the permanence of legal rules was recognized as an obstacle to progress. None before or since have surpassed Cujas in exposition of the civil law; his warning against giving too much effect to mere legal rules is impressive.

Every rule of the civil law, he said, is slippery and perilous; it is not certain, not rigid, not perpetual. It rests on relative reasoning, not, like scientific truth, on absolute deduction from necessary premises. Law has no necessary deductions.

"Omnis ergo regula juris civilis lubrica et periculosa est, non certa, non necessaria, non perpetua. * * Jus quidem scientia est laxa notione, sed non simpliciter et absolutè, nam scientia ex necessariis necessaria concludit. Juris nulla est conclusio necessaria."

Cujacius, Opera, vol. 8, p. 707 (Paris, 1758).

The obligation to contribute for sacrifices made for the common safety is not such an artificial rule. It is a principle. The status of the persons on board, the duty as to slaves, the contribution for objects on the person of the passenger, the liability of the shipowner for prior faults in navigation—all these rules are subject to change. When the owner's constructive fault is abolished, he is entitled to give and take under the principle of contribution, like any other party in interest who is free from fault.

The other principle, that of uniformity in maritime law, is the best safeguard of justice to vessels and cargoes. The nearest approach to Cicero's ideal among human institutions is the widening sweep of the law of the sea as its ideas pass from land to land, tending to bring about a uniformity of right. To that principle appellees submit their cause. The decree below gives the same rights here that are acknowledged in other maritime States with which our commercial relations are close and intimate. It would be a reproach to Congress, and a deep injury to our jurisprudence, if our courts should hold these points of private international law adversely to the settled law

of Great Britain, France, Germany, the Netherlands, Denmark, and the Scandinavian States.

It is therefore respectfully submitted that the question certified should be answered affirmatively.

HARRINGTON PUTNAM
Advocate.

April 9, 1898.